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AO 2010-21

August 6, 2010

VIA HAND DELIVERY

Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 AUG -9 AM 9:17
OFFICE OF GENERAL
COUNSEL

RE: Advisory Opinion Request – ReCellular, Inc.

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f and 11 CFR § 112.1(a), we request an advisory opinion on behalf of our client, ReCellular, Inc. (“ReCellular”). ReCellular asks whether the Federal Election Campaign Act of 1971 (the “Act”) and Federal Election Commission regulations permit the company’s proposal to allow individuals to contribute to political candidates the proceeds from the sales of used cell phones. As this is a highly significant, time-sensitive request relating to an upcoming election, ReCellular asks that the Commission expedite this request and render an opinion within 30 days under its general expedited process. *See* Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg., 32,160, 32,162 (July 7, 2009).

I. Background

ReCellular, a privately held for-profit corporation based in Dexter, Michigan, is the world’s largest recycler and reseller of used cellular phones and accessories. The company collects used cell phones both through donation programs and by purchasing directly from consumers. It evaluates each phone, and, depending on its condition, either resells it, refurbishes it, reuses its salvageable parts, or recycles it to sell its component materials. ReCellular collects phones primarily in three ways: in drop-off boxes the company provides at retail stores, sporting events and other public locations; in pre-paid envelopes distributed by electronics retailers to purchasers of new cell phones and through other envelope-distribution programs; and by purchasing cell phones through an internet site established by ReCellular, www.SecureTradeIn.com (the “website”). In the first two methods (drop-off boxes and distribution of pre-paid envelopes), ReCellular does not pay consumers for their phones and the company will accept any phone,

regardless of condition or age. ReCellular uses the website, in contrast, to pay consumers for select models of working phones. This advisory opinion request concerns only transactions using the website.

Over the website, a consumer may sell the company a cell phone, if it meets certain criteria:

1. The phone must be one of approximately 425 models for which ReCellular has identified a high demand for phones or parts;
2. The phone must be able to power up;
3. The phone must be able to make an outgoing call;
4. The phone must not be waterlogged;
5. The phone's hardware (e.g., hinge, antenna, housing) must not be broken or missing pieces; and
6. The phone's LCD screen must not be damaged.

Website users enter the model of their phone, and the website displays the price ReCellular will pay. Newer models are priced up to \$168 for certain models of Apple's iPhone and \$242 for the Droid Incredible, while the company pays only \$5 for a years-old Motorola RAZR. The vast majority of website transactions are for phones worth less than \$50.

If the user wants to sell for the quoted price, he enters his contact information, and the website produces a pre-paid shipping label which he may print and use to send his phone to ReCellular. When ReCellular receives the phone, it is tested to confirm it meets the sales criteria, and the company sends a check to the user. In the company's experience, only a very small fraction (approximately 5 percent) of phones sent to ReCellular in this program fail to meet the criteria. If a phone does not meet the criteria, ReCellular informs the seller that it will not purchase the phone and offers to return it for free.

To determine the price it will pay for a particular model phone, ReCellular considers the amount competitors¹ are paying; the supply of used phones in that model; the demand for parts and used or refurbished phones in that model; and the cost of obtaining and processing a phone, which includes the cost of providing free shipping, testing the phone for defects, wiping its memory clean, and processing and sending the payment check and confirmation to the seller. As with any business, the company seeks to maximize profit by attracting as many sellers as possible without overpaying for phones. Prices offered on the website represent a phone's fair market value.

In keeping with its corporate philosophy, ReCellular has numerous partnerships through which it accepts phones and donates the proceeds to charity. Of particular note for purposes of this advisory opinion, ReCellular already has a program on the website whereby a consumer may choose to donate the proceeds from his phone sale to a nonprofit organization, rather than having ReCellular send the check to the consumer. Under this program, ReCellular sends the charity the full purchase price due to the consumer, and the charitable contribution is made in the consumer's name. The consumer has full control over whether to accept and deposit into his

¹ Other entities purchasing old cell phones include www.gazelle.com, www.flipswap.com, www.dealtree.com, www.yourenew.com, and www.pacebutler.com.

own account the proceeds from the purchase or to donate them; and full control over which of the featured charities will receive the donation.

II. ReCellular's Proposed Program

ReCellular proposes giving consumers the option to contribute the proceeds from their cell phone sales to the federal candidate or political committee of their choosing. Under the proposed program, ReCellular would list federal candidates, political party committees and non-connected political committees on the website, along with a statement that inclusion on the website does not imply endorsement by ReCellular. Consumers selling their used cell phones could then opt to have ReCellular send the proceeds from their phone sales directly to a listed candidate or committee. Consumers could still choose to have ReCellular send payment for the phone to the consumers themselves, or consumers could choose to donate the proceeds to one of the charities listed on the website.

ReCellular will make the program available to all federal candidates,² national political party committees and non-connected political committees. The company plans to contact the candidates who have qualified for the ballot in each United States House of Representatives district and in each election for United States Senate. Only those candidates who consent to being listed will be included in the program. Additionally, any political party committees and non-connected political committees that contact ReCellular to request inclusion will be listed on the website. ReCellular will calculate the incremental cost of adding a particular candidate or committee to the program and will bill the candidate or committee for that amount.

To publicize the program, ReCellular will contact the media regarding the program, send emails to the individuals and others in the company's database, and engage in other means of mass marketing. The company will not mention the names of federal candidates or political committees in its publicity materials. Furthermore, ReCellular will not send communications to lists owned by federal candidates or committees, as the proposed program does not involve list swaps, rentals or other exchanges of names. Candidates and others listed on the website will be free to inform their supporters about the opportunity to donate the proceeds from a cell phone sale, but if they do this, it will be on their own accord and not as part of any agreement with or condition imposed by ReCellular. If participating candidates or committees choose to inform their supporters about the program, the content of these communications will be directed and controlled solely by the participant and not by ReCellular.

When a consumer using the website opts to direct his payment to a candidate or committee, the website will require the consumer to confirm 1) that his donation will not exceed his contribution limit to the chosen candidate or his aggregate limit, and 2) that the contribution does not violate the prohibitions set forth in the Act regarding contributions by corporations, labor organizations, national banks, federal contractors and foreign nationals. In addition to the personal information

² ReCellular will reach out to all U.S. House and Senate candidates who have 1) qualified for inclusion on their state's ballot and 2) met the definition of "candidate" under 2 U.S.C. § 431(2). See AO 1998-17 (Daniels Cablevision, Inc.) (providing free air time "to all *bona fide* candidate[s]" for U.S. House and Senate in the company's coverage area).

the website asks of all sellers (including name, address and email address), those choosing to contribute to a candidate or committee will be asked to provide their occupation and the name of their employer.

Upon completion of the transaction, the website will provide the consumer with a pre-paid shipping label to use in sending the phone to ReCellular. Sending a pre-paid shipping label is standard practice in this industry.³ If a vendor does not provide a pre-paid label, consumers either may not bother sending the phone, or they may sell it to a competitor who provides free shipping. The cost of this free shipping is built into ReCellular's pricing model.

Each phone that arrives at ReCellular is tagged with a unique Electronic Serial Number, enabling the company to track and audit the phone, including its make and model, its quoted price, condition and ultimate disposition. If a consumer sends a non-working phone to ReCellular, he will not be paid. And, if the consumer had designated the proceeds of his sale as a contribution to a candidate, that candidate will not receive any payment. This system protects against ReCellular crediting a consumer for more than the fair market value of his phone and eliminates the possibility that ReCellular will send money to a candidate if the funds had not vested to the consumer.

Under the proposed program, when a consumer has designated the proceeds of his phone to a candidate or committee, ReCellular will send the consumer an email informing him that the contribution has been forwarded to the recipient, and confirming the amount of the consumer's contribution. This confirmation email will state that the contribution amount counts toward the consumer's contribution limit for that particular candidate or committee. Within ten days of ascertaining that the consumer's phone was worth the quoted price, the company will send a check for the contribution amount to the designated candidate or committee, along with the date of the contribution and the contributor information the consumer provided on the website.

III. Questions Presented

1. Does the program described, whereby individuals who sell a used cell phone to ReCellular and direct the company to send the proceeds from that sale to a political candidate or political committee chosen by the individual, comply with the Act and Commission Regulations?
2. If the fair market price of the phone sale already reflects the company's costs for shipping, processing, sending a confirmation to the seller and transmitting the payment, must ReCellular impose those costs a second time, onto the entity to which the consumer has directed a contribution?
3. Under the proposed program, the only additional cost ReCellular will incur when processing a consumer's check is the incremental expense of emailing the candidate or

³ See, e.g., www.flipswap.com ("It's fast and free (including shipping).") and www.gazelle.com ("We pay for shipping, and we'll even send you a box.").

committee with the consumer's name, address, occupation and employer, and date of contribution. As the incremental cost of this email is de minimis, must ReCellular charge the recipient for this amount?

IV. Legal Analysis

Under the Act, corporations may not use their general treasury funds to make a contribution or expenditure in connection with an election to any political office. 2 U.S.C. § 441b(a). A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(8)(A)(i), and "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization, in connection with any election ..." 2 U.S.C. § 441b(b)(2). The term "anything of value" includes in-kind contributions and "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 CFR § 100.52(d)(1). The term "usual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution." *Id.* at 100.52(d)(2).

The Act also bans contributions by national banks, labor organizations, government contractors and foreign nationals, and it imposes limits on the amounts a person may contribute to a candidate, a national political party committee or to other political committees. 2 U.S.C. §§ 441(a)(a), 441b(a), 441(c), 441(e).

In prior advisory opinions, the Commission has approved affinity programs with the same elements as the program proposed by ReCellular, although this proposal is less complex than some previously approved.⁴ Under the advisory opinions approving affinity programs, the Commission has held that a consumer may direct a corporation to send funds under the consumer's control to a political committee, and that corporation may provide some services in the transaction, as long as those services are provided in exchange for bargained-for consideration in a commercially reasonable relationship. *See, e.g.*, Advisory Opinions 2006-34 (Working Assets), 2003-16 (Providian) and 2002-07 (Careau & Co.). "[T]he Commission has concluded that so long as: 1) the corporation and political committee enter into a commercially reasonable transaction, and 2) the amounts contributed to political committees via rebates or rewards are from individual customers' funds and not from the corporation's funds, then the arrangements are *bona fide* commercial transactions that do not entail prohibited corporate contributions under 2 U.S.C. § 441b." Advisory Opinion 2008-18 ("Mid-Atlantic Benefits").

A. Commercially Reasonable Transactions Involving Candidates and Corporations

The proposed program involves transactions both between ReCellular and its customers, and between ReCellular and the candidates and committees that ask to be listed on the website.

⁴ ReCellular is not asking to use the mailing lists of the candidates and other committees that will appear on the website, thus eliminating the question of valuing those lists and the services provided in exchange.

When evaluating arrangements in which corporations are involved with fundraising by candidates or other committees, the Commission has approved “situations involving commercially reasonable relationships in which a vendor receives the usual and normal charge for its services, including an adequate profit and compensation.” AO 2002-07 (citing Advisory Opinion 1994-33 (VITEL)). By this standard, both sets of transactions are commercially reasonable.

1. Transactions Between ReCellular and Customers

ReCellular determines the price it will pay for a given phone based on a variety of factors, explained above in section I. ReCellular pays fair market value for phones, but it will not purchase a phone unless the transaction will earn the company a profit. Pricing for used wireless equipment is transparent: It takes only a minute or two for a consumer to comparison-shop on multiple websites to determine the best price offered for a particular phone model.⁵ Transparency ensures the price paid by ReCellular to a consumer is the company’s usual and normal fee. A phone’s price is set before the customer indicates whether he will have the check sent to himself or whether he will donate the proceeds of the sale to a charity or a candidate or committee. Thus, there is no reason to question the commercial reasonableness of the transactions involving candidate contributions.

2. Transactions Between ReCellular and Candidates and Committees

The proposed program involves two types of transactions between ReCellular and candidates or other committees. The first occurs when ReCellular decides whom to list on the website as a potential recipient of contributors’ funds. The second occurs when the company transmits a consumer’s contribution and personal information to the candidate or committee.

ReCellular’s program will be open to all U.S. House and Senate candidates, all national political party committees, and all non-connected political committees.⁶ Those who ask to be included will enter into a written agreement with ReCellular, confirming that the candidate or committee consents to be listed on the website and will pay the incremental programming costs of adding their name as an option on the website and including them in the program. This payment represents a commercially reasonable payment for the cost of including the candidate or other committee in the program.

In AO 2006-34, Working Assets charged political committees for expenses related to processing and transmitting contributions. Nearly all of those costs are already accounted for in ReCellular’s proposed program. When calculating a phone’s fair market value, ReCellular includes its costs for shipping, obtaining the seller’s personal information, sending the seller an

⁵ ReCellular believes its pricing model is more transparent than its competitors’ models, because competitors’ prices depend on subjective evaluations of a phone’s condition and whether the seller has the original wires and other materials. See, e.g., http://www.gazelle.com/sell-cell-phones/motorola/razer-series/6182-Motorola_RAZR_V3m. For this reason, ReCellular’s online price will often be lower than that initially quoted by its competitors.

⁶ Separate segregated funds will be excluded from this program, due to the administrative difficulty of determining whether an individual is a member of the connected organization or its solicitable class. See 2 U.S.C. § 441b(4).

email confirmation of the transaction, processing the phone, and processing and transmitting the payment. Because these costs are included in setting a phone's fair market value, the customer has already paid these shipping, processing and transmission costs; the customer would receive more money for his phone if ReCellular were not burdened with those costs. By extension, the committee would receive a larger contribution from the customer if the price of the cell phone did not already reflect the shipping, processing and transmission costs. Because the transaction price was set to compensate ReCellular for these costs, no corporate contribution results if the company pays to send the check to a candidate rather than to the customer, at the customer's direction. Furthermore, if ReCellular were to require candidates and other committees to make a direct payment for shipping, processing and transmitting the check, the company would be double-charging for those costs, and the transaction no longer would be commercially reasonable.

The only additional cost involved with allowing a customer to direct his payment to a candidate or committee (or to a charity, as ReCellular already offers), is the cost of providing the candidate or other committee with the contributor's name and personal information. ReCellular has built into its pricing the cost of sending the check to the recipient (usually the consumer or a charity, or, under the program, to the consumer). Therefore, the only added cost is that of sending the personal information to the candidate or committee. ReCellular will send this data automatically from the website to the candidate or committee via email. The incremental cost of this email is de minimis.

B. Amounts Contributed to Political Committees are From Individual Consumer's Funds

Because the amounts contributed to political committees will be from funds controlled by ReCellular's consumers, the program also meets the second prong of the Commission's criteria. In AO 2006-34, Working Assets offered its wireless telephone customers an automatic rebate of ten percent of their monthly charges. The rebates occurred in the ordinary course of the company's business. Under that program, individual customers were given the option of either 1) receiving the rebate as a monetary credit, or 2) directing the rebate amount as a contribution to a political committee of their choosing. The Commission approved the program on the grounds that these payments occurred in the ordinary course of the company's business, and that the "customers, rather than [the company], would control the disposition of rebates." AO 2006-34.

Similarly, in AO 2003-16, credit card consumers earned rebates, which they could choose to have sent to themselves or to forward to a national party committee. Because "[r]ebates that have vested are the property of the cardholder," the consumer's decision to have Providian National Bank send the rebate to a national party committee did not constitute an illegal contribution from Providian. AO 2003-16. Instead, the consumer was treated as the donor, and the Commission approved the program.

Under ReCellular's proposed program, the money contributed to a candidate will be funds that became the property of the consumer in the course of a bargained-for exchange of a used cell phone for a commercially reasonable price. The funds will be under the control of the consumer,

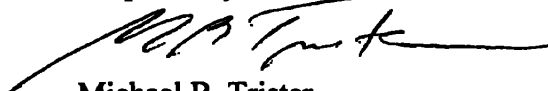
who may choose to have the money sent to himself, sent to a nonprofit listed on the website, or sent to a federal candidate or other committee listed on the website.

V. Conclusion

Because ReCellular and the candidates and other committees will enter into commercially reasonable transactions, and because the amounts contributed will be from funds directed and controlled by individual consumers and not from the corporation's funds, the arrangements are *bona fide* commercial transactions that do not entail prohibited corporate contributions. For this reason, the first question presented should be answered in the affirmative and the second in the negative. Because sending the candidate or committee an email with the contributor's personal information and date of contribution will have only a de minimis incremental cost, the third question should be answered in the negative.

If you have any questions or if additional information would assist your analysis, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. Trister", with a long horizontal flourish extending to the right.

Michael B. Trister
Allen H. Mattison



"Allen Mattison"
<amattison@ltsrlaw.com>
08/20/2010 09:27 AM

To <TLutz@fec.gov>
cc "Mike Trister" <mtrister@ltsrlaw.com>
bcc
Subject RE: ReCellular AOR

Dear Mr. Lutz,

Both of the statements below are accurate.

Please let me know any other questions you may have.

- Allen Mattison

Allen Mattison
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From: TLutz@fec.gov [mailto:TLutz@fec.gov]
Sent: Thursday, August 19, 2010 7:05 PM
To: Allen Mattison
Cc: Mike Trister
Subject: ReCellular AOR

Dear Mr. Mattison:

In our telephone conversation on Tuesday, August 17, you provided us with additional information regarding the request by ReCellular, Inc. for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

(1) ReCellular proposes to use the program described in its advisory opinion request ("AOR") to forward contributions to candidates in future elections, such as the 2012 presidential election. Accordingly, ReCellular would like to expand the scope of the AOR to include contributions to presidential candidates.

(2) If ReCellular must obtain payment for the "de minimis" cost that it incurs in sending to each political committee to which it forwards a contribution an e-mail about the contribution and the contributor, then ReCellular proposes to bill each recipient political committee on a monthly

basis for the aggregate cost of sending notification e-mails to that political committee. Billing each recipient political committee on a monthly basis would be less administratively burdensome to ReCellular than calculating the cost of each e-mail and reducing the price that it pays for each phone accordingly.

We would appreciate your response by email. This e-mail and your response may become a supplement to your AOR and, if so, will be made available to the public by the Commission.

Thank you very much for your cooperation.

Sincerely,

Theodore M. Lutz
Law Clerk, Office of the General Counsel
Federal Election Commission
(202) 694-1345